IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5386 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUKESHBHAI NANJIBHAI PANCHAL

Versus

STATE OF GUJARAT

Appearance:

MR JS RATHOD for the Petitioner.

Ms.Archana Raval, Assistant GOVERNMENT PLEADER, for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 26/07/2004

ORAL JUDGEMENT

By filing this petition, the petitioner-detenu has challenged his detention order dated 17th January,

2004,by which he is detained as a 'bootlegger' under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). Along with the order of detention, the petitioner-detenu has also been served with the grounds of detention.

In the grounds of detention, there is a reference in connection with six criminal cases. All these cases are under the Bombay Prohibition Act. After considering the aforesaid cases, the petitioner is detained under PASA. The authority has not recorded the statements of any other witnesses and only on the basis of the six registered cases, the petitioner is detained under PASA. It is the aforesaid order which is challenged in this petition at the instance of the petitioner.

The learned Advocate for the petitioner submitted that, at the relevant time, i.e., at the time when the detention order was passed, the petitioner was in judicial custody. It is submitted that the authority has not properly recorded its subjective satisfaction as to how he will be released on submitting application for bail, even though he is in judicial custody in connection with the sixth criminal cases. In this behalf, reference is required to be made to the detention order itself. The detaining authority has stated that in connection with cases at serial Nos. 1 to 5, the detenu is already released on bail and as regards the case at serial No.6, after his release on bail, the petitioner will continue his activity again. It is required to be noted that there is nothing on record to suggest that even a bail application is moved by the petitioner. The learned Advocate for the petitioner also submitted that the petitioner has not moved bail application in connection with the criminal case at serial No.6.

In this connection, the learned Advocate for the petitioner has relied upon the decision of the Apex Court in Amritlal & Others v. Union Government and others, AIR 2000 SC 3675, wherein the Honourable Supreme Court has observed as under :-

" ... ...

4. In Augustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 Cri LJ 1959) wherein it was held that if a person is in custody and there is

no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-

"Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."

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6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is 'likelihood of the petitioners being released on bail' that however is not available in the reasonings as provided by the concerned officer. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail.' This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail

application moved in the matter but not obtaining a bail order.

... ..."

Ms.Archana Raval, learned AGP, however, submitted that since the petitioner is already released on bail in five cases, the petitioner might get bail even in the sixth case. Even if that be so, such aspect should have been properly reflected in the order. In the instant case, there is nothing to suggest that even any bail application was moved on behalf of the petitioner. Normally, when the petitioner is repeating the offences, even the concerned Magistrate will be slow in granting bail if a particular bail application is still pending for decision.

Considering the aforesaid judgment of the Apex Court and considering the fact that the authority has not properly recorded its subjective satisfaction as to how the petitioner, even though he is in judicial custody in connection with the criminal case at serial No.6, on submitting an application for bail, will be released on bail, the order of detention is required to be set aside.

It is, however, clarified that setting aside of the detention order should not be treated as a favourable ground by the concerned court while deciding the bail application. It is for the concerned Public Prosecutor to oppose the bail application, if it is of the opinion that the petitioner is a habitual offender. However, this aspect is required to be highlighted by the Public Prosecutor in charge of the criminal case and who is required to oppose the bail application.

This petition is accordingly allowed. The order of detention is quashed and set aside. It is ordered that the petitioner be released forthwith unless he is required in connection with any other case. Rule is made absolute.

26th July, 2003 (P.B. Majmudar, J.)

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(apj)